STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 11,232
	)	
Appeal of	)	

INTRODUCTION

The petitioner seeks to expunge a finding by the Department of Social and Rehabilitation Services that he sexually abused a child under his care at a day care center.

FINDINGS OF FACT

1. In April of l99l, the Department received a report from a child care center that the parent of a young girl reported that her child may have been abused by a teacher, the petitioner herein.

2. The report was turned over to an experienced SRS employee trained in investigation of abuse reports. He commenced an investigation on April 24, 1991, and during its course, spoke to several employees at the child care center. After his investigation, he found that he could not substantiate the complaint made by the girl's mother. However, he determined to broaden the scope of the investigation to include other behaviors and potential victims, based on statements made to him by witnesses in the first investigation.

3. In the course of that second investigation, in which the SRS investigator interviewed several parents and children at the center, another child's mother reported that her three

year old son, M.W., was afraid to use the bathroom, and that she suspected something had occurred between the petitioner, who was the child's teacher, and the child.

4. Some time early in May of 1991, the SRS investigator set up an interview at the child care center with M.W. That interview was attended as well by a police lieutenant, the boy's mother, and his stepfather. (The stepfather left before the interview was completed.) Prior to the interview, the investigator spoke briefly with the child's mother who told him that the child had expressed a fear of flushing the toilet because the petitioner had allegedly told him that he would "flush his head down the toilet".

5. The interview with the child was not recorded because the investigator felt it would be too distracting for the child. During the interview he took some notes and made some after the interview. The investigator did not offer those notes at the hearing. Prior to asking the child questions, he asked him to name colors, and tell his name and address. He did not ask him any questions about his understanding as to what is the truth and what is a lie. During the interview, he took several breaks to play with the child. He testified as to what questions were asked and what statements were made by the child based on a report he prepared on or about June 18, l991. A copy of that document is attached hereto, and incorporated herein by reference as Exhibit One. The testimony offered by the investigator contained the same

information as that in the first paragraph of Exhibit One.

5. Although he was not formally notified that an investigation was taking place, the petitioner became aware of it on April 24, 1991. He was suspended from his employment on April 26, pending the outcome of the investigation. On April 29, he called the police department to confirm that he was being investigated. On April 30, 1992, he met with the investigator and a police officer to discuss the investigation. At that time, the petitioner asked them questions about investigative procedures but offered no information. He was unable to find out who was making the allegations or what they were at that time. The petitioner informed the investigator that he wanted to get an attorney.

6. Sometime during the next few weeks, the investigator made an unannounced visit to the petitioner's home but the petitioner was not in. He did not leave a message that he had been there or attempt to contact the petitioner again prior to making a decision in the matter.

7. On June 18, 1991, the SRS investigator mailed the petitioner a letter stating that an allegation that he had sexually abused a child, "M.W." had been received and investigated and a determination had been made that it was substantiated. The petitioner was also notified that the report had been forwarded to the Division of Licensing and Regulation for their review and that he had a right to appeal.

8. The investigator made a decision to substantiate the

allegation for the following reasons: (1) the clearness of the statement itself and the fact that he repeated the allegation that the petitioner had "touched his pee-pee" three times; (2) the child's ability to pinpoint the place--the slide room--where the abuse had occurred; (3) information obtained from other workers at the child care center that the petitioner may have had an opportunity to be alone with the child in the slide room; and (4) behavior reported by other teachers which the investigator interpreted as "grooming" behavior consistent with child abuse.

9. Following the notice of finding, the petitioner appealed and had a meeting with a representative of the Commissioner of SRS. At that meeting the petitioner learned for the first time what the specific charges against him were and the child involved. In addition to a general denial of the abuse, the petitioner criticized the lack of due process afforded to him in the process and asked that the director of the child care center be interviewed with regard to his opportunity to be alone with the child and his behavior at the center, complaining that those interviewed were biased against him for one reason or another.

10. The Commissioner agreed to reopen the case to reinterview the director of the child care center. The allegedly abused child, M.W., was reinterviewed as was his mother. During the child's interview, his mother was present, but not the police lieutenant, as a decision had been made not

to prosecute the case. The child's statements were not recorded. No contemporaneous notes of his statements were offered into evidence. The investigator's recollection of the statements made by the child were based on a report he wrote February 19, l992, which is attached hereto and incorporated by reference as Exhibit Two.

11. The child's mother reported to the investigator that the child was still fearful of the petitioner and that she herself had remembered seeing the petitioner buttoning her son's pants and questioning him as to whether that was necessary as he could do it himself. The child's mother did not testify to these or any other events at the hearing. These statements are clearly hearsay and were admitted only to show what information the Department acted upon, not for their intrinsic truth.

12. In addition to the above information, SRS interviewed the director with regard to the petitioner's and the child's schedules. After weighing the information, SRS again substantiated the allegations of abuse against the petitioner in a decision dated February 19, 1992.

13. In addition to the above findings, the testimony offered at the hearing by the then director of the child care center and an aide established that the petitioner was only alone in the building with children on very rare occasions. From 3:30 p.m. to 5:00 p.m., the petitioner was the only

teacher in the school but there was also an administrator there at the same time who "floated" through the building. M.W. was usually picked up by his step-father between 3:30 p.m. and 4:00 p.m., but sometimes as late as 4:30 p.m. The slide under which the alleged abuse took place was located upstairs from the petitioner's classroom, and was accessed either by a front staircase or a back staircase from the petitioner's classroom. The underside of the slide has several points of entry which are too low for an adult to use. However, it might be possible for an adult to reach into one of the portholes under the slide. Neither witness has ever observed the petitioner sexually abuse a child and neither has observed any inappropriate behavior with M.W. specifically.

14. The two above witnesses disagreed as to whether or not the petitioner had engaged in inappropriate behaviors with other children. The aide (who supervised two-year-olds) complained regarding some of the petitioner's disciplinary processes (holding a child's hands behind his back) and the fact that he took photos of the children. The director testified that his actions followed center policy on disciplining children and that the photos were taken in order to make a classroom scrapbook of the children. The director also felt that some of the complainants were biased against the petitioner out of jealousy regarding his position as head teacher. It is not necessary to make a factual determination as to whether other complaints, valid or otherwise, were made

against the petitioner while he was there in order to decide this case.

15. Both witnesses agreed and it is therefore found that M.W. sometimes wets his pants and is assisted, thereafter in changing his clothes. It is also found based upon their testimony that M.W. continued to play on and enjoyed the slide after the alleged incident.

16. The petitioner denies the allegations made against him. He speculated both before the Commissioner and the Board's hearing officer that the child may have been expressing anxiety over an incident he may have observed involving three boys who were required to clean up a mess they made in the bathroom or over an incident involving some children who were exposing themselves. The petitioner has had to change the child on one or more occasions due to wet pants (either from urinating on himself or getting wet outside). He recalls that the child's step-father asked him not to put M.W. into day care center pants when this occurred and always supplied a dry set of clothing.

17. Based on the above, it cannot in fairness be concluded that the child was actually touched on the penis by the petitioner or that if such a touching did occur that it was done for some inappropriate reason. This is for a number of reasons. To begin with, while the Board has determined that hearsay evidence regarding a child's statements is admissible in the context of a hearing such as this, the

evidence must be of such a quality that it can be fairly determined specifically what questions were asked of a child and what specific answers were given. This is because the statements of children, especially very young children, are often unsophisticated and frequently not what they seem. Those statements almost always require close examination and interpretation and are sensitive to suggestion or coercion (as is any testimony). It is very important to see the context in which such statements are made. While it is not essential that these statements be electronically recorded, they must be recorded in enough detail for the hearing officer, as the trier of fact, to judge whether these statements are spontaneous or coerced or are mitigated or explained by other statements made by the child. The interview summary in this case as set forth in the testimony and Exhibits One and Two is very scant and almost totally devoid of detail. For example, there is no explanation in the interview of what the child meant by his "pee-pee", no explanation of what he was doing or whether he was clothed when the touching took place, no attempt to pin down when or how often this occurred, or whether the child was in the presence of other adults or children.

What is contained in this summary is almost of as much concern as what is not in it. The child is also said to have made a statement that two other persons had touched his "pee-pee" as well. While SRS did determine who these other persons

are, no effort was made to investigate these complaints. This raises the question of whether the investigator simply did not believe these other complaints and, if so, why he chose to believe it in the petitioner's case. A similar accusation regarding several persons also raises questions as to whether the touching he referred to was something quite innocent and routine which happened all the time with all kinds of people or whether no one was really touching his penis at all, and the child was merely using a lot of "bathroom talk" in a nonsensical way. Without more probing for context and clarification, it is impossible to make this determination.

SRS also relies on the pinpointing of the place where the touching took place to credit the child's testimony. While this is an important detail, this placement alone without some other explanation of context does not prove sexual exploitation. In a situation where the petitioner very well might have had legitimate reasons to be changing the child's underwear and perhaps touching his penis, some evidence has to be offered that any touching was done in a non-appropriate context.

Similarly, while the lack of opportunity to be alone with the child might be a defense against a finding of child abuse, the obverse, the frequent opportunity to be alone with a child, does not prove that the child abuse occurred. The petitioner does not argue that he did not spend considerable amounts of time with the child as his teacher or that he may

have had occasional rare opportunities to be alone with him.

Finally, SRS argues that a basis for its finding the child's statement credible is the concurrent existence of "grooming" behavior. However, the Department offered no admissible evidence as to what that behavior might be. Certainly the potential existence of other unspecified complaints regarding the petitioner's performance as a teacher are not probative on this issue.

For all of these reasons, there is not sufficient evidence to establish that the petitioner either touched the child's penis or touched his penis in a context which did not involve his duties as caretaker (cleaner and changer) of the child.

ORDER

SRS' decision that the report of sexual abuse of M.W. by the petitioner is substantiated is reversed, and the record containing this matter is expunged from the Department's registry.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. ə 4916 which provides in pertinent part as follows:

> (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated

> under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.
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> . . .
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> (h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. э 4912(10) and Fair Hearing No. 10,136, 8446, and 8110.

"Sexual abuse" is specifically defined by 33 V.S.A. э 4912 as follows:

> (8) "Sexual abuse" consists of any act by any person involving sexual molestation or

> exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this case there is no credible evidence that the petitioner molested, exploited, or otherwise sexually abused the child in question. There is indeed very little from which it could be concluded at all that the petitioner actually touched the child's penis. There is absolutely no context in the evidence from which it could be found more likely than not (a preponderance of the evidence) that deliberate touching or other sexually abusive behavior was perpetrated by the petitioner against this child at the day care center. An ambiguous statement without context cannot form the basis for a finding of abuse. See Fair Hearing No. 9989.

This does not mean, of course, that this behavior may not have occurred, only that the Department has failed to show that it did by a preponderance of the evidence. While it may be more convenient for the Department not to tape record interviews with children, it must be apparent to the Department by now that without such a recording, it is very difficult to show the required detail (especially involving the ambiguous statements of young children) needed to draw a

fair conclusion as to what those statements mean or their credibility. (See also Fair Hearing No. 10,136 in which the Department failed to meet its burden due to the poor quality of the summary of the child's statements.)

Because this case was decided in the petitioner's favor on other grounds, it is not necessary to rule on the petitioner's due process claims. Motions by the petitioner to suppress the hearsay evidence offered by the Department as to the child's statements is denied based upon the Board's Fair Hearing Rule No. 14 and the reasoning in Fair Hearing No. 10,136 in which the Board held that a summary of a child's interview statements made by an SRS investigator is admissible for the truth of the matter therein, but is subject to a determination by the hearing officer as to the sufficiency and weight to be accorded to the summary. The Department's argument that the hearing cannot be held on a de novo basis is rejected based on the reasoning in the Board's decision in Fair Hearing No. 10,136 which is factually indistinguishable on that issue.

RULINGS ON PETITIONER'S PROPOSED FINDINGS OF FACT

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Granted.

9. Denied as to the status of M.D. The only evidence available at the hearing indicated that M.D.'s was the boy's stepfather.
10. Granted.
11. Granted.
12. Granted.
13. Denied. It is not clear from the evidence that he was asked those questions.
14. Granted.
15. Denied.
16. Granted with the exception of characterizing the question as leading.
17. Granted.
18. Granted.
19. Granted.
20. Denied.
21. Denied.
22. Granted.
23. Granted.
24. Granted.

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